APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 14526 SEPTEMBER TERM, 1963—APRIL SESSION, 1964

THE PURDY COMPANY,
Plaintiff-Appellant,
v.
ARGENTINA, a foreign state, and DIRECCION GENERAL DE FABRICACIONES MILITARES OF ARGENTINA,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 11, 1964

Before SCHNACKENBERG, CASTLE and SWYGERT, *Circuit Judges.*

CASTLE, *Circuit Judge.* The Purdy Company, plaintiff-appellant, brought suit in the District Court against Argentina and Direccion General DeFabricaciones Militares of Argentina,[1] defendants-appellees, to recover monies allegedly due under a contract for the sale and delivery of steel scrap. The contract, made in Buenos Aires, Argentina, called for delivery of the steel at Buenos Aires consigned to DGFM. It contains a "Manner of Payment" clause requiring DGFM to establish a letter of credit upon

[1] An Argentine corporation, referred to herein as DGFM. The complaint alleges that Argentina made the contract here involved "by and through" DGFM "a department of the government" of Argentina through which Argentina owns and operates the steel manufacturing industry of that country.

the First National Bank of Chicago in favor of plaintiff. Conditions precedent to payment include presentation of the following documentation:

"(1) Complete set of Bills of Lading, issued on the basis of a freight contract, listing the goods aboard and below deck, freight prepaid (Original and two copies).

(2) Commercial Invoice, in quadruplicate (Original and Duplicate) establishing the C. & F. value of the goods in Buenos Aires, duly legalized by an Argentine Consul.

(3) Argentine Consular Invoice, in triplicate, duly legalized."

The record discloses that DGFM established the letter of credit and that plaintiff furnished the required documents which were "legalized" or authenticated by the Argentine consul at Chicago, Illinois.

Summonses to each of the defendants were served on the Argentine consul at Chicago. This service was quashed as to DGFM and an alias summons was then issued and served on DGFM at Buenos Aires. Such service was also quashed on the motion of DGFM and thereafter DGFM was dismissed as a party to the action. A default judgment entered against Argentina was vacated on its special and limited appearance and motion to quash the service of process and to dismiss. The service on Argentina was quashed and the action dismissed.

Plaintiff's appeal from the judgment orders vacating the default judgment against Argentina, quashing the service of the summonses, and dismissing the action precipitates two main contested issues:

(1) Whether service upon the Argentine consul at Chicago conferred *in personam* jurisdiction over Argentina, a sovereign foreign state, and such jurisdiction over DGFM.

(2) Whether extra-territorial service of summons on DGFM at Buenos Aires was effective to obtain *in personam* jurisdiction over DGFM.

Plaintiff contends that the function performed by the Argentine consul at Chicago in authenticating the documents required to be presented as a condition of payment made the consul an agent of his government and of DGFM for the purpose of service of process and that the establishing of the letter of credit on the Illinois bank and payments made thereunder on authentication of the documents in Illinois constituted transaction of business in Illinois so as to authorize the extra-territorial service of summons on DGFM at Buenos Aires under the provisions of Rules 4(f) and 4(d)(7) of the Federal Rules of Civil Procedure (28 U.S.C.A.) and Section 17(1)(a) of the Illinois Civil Practice Act (Ill. Rev. Stat. 1963, ch. 110, § 17(1)(a)).

In connection with its contention that the service of summons on the Argentine consul was effective to obtain jurisdiction over Argentina the plaintiff urges that the purely commercial nature of the transaction involved calls for application of the restrictive immunity doctrine—the doctrine underlying the policy of the Department of State, as expressed in the "Tate Letter",[2] of not suggesting to the courts that a sovereign be granted immunity from suit where the action arises out of commercial activities of the foreign state. Plaintiff asserts that unless the foreign nation's consul is recognized as its agent for the service of process in such actions the doctrine of restrictive immunity would be rendered meaningless since no action would ever be maintainable without first obtaining the consent of the sovereign. The conclusion plaintiff thus attempts to draw overlooks the area in which the doctrine otherwise can have full recognition and application—cases in which *in rem* jurisdiction exists

[2] 26 Dept. State Bull. 984-985 (1952). In this connection it is noted that the record indicates that the instant suit was brought to the attention of the State Department and a claim of sovereign immunity asserted. But the record discloses no intervention by the State Department suggesting that immunity from the suit be granted.

and those situations in which the foreign state invokes jurisdiction of the court and thereby subjects itself to a counterclaim to which the doctrine is applicable. Moreover, the issue here is one of acquisition of jurisdiction, not that of a limitation on a release from jurisdiction already acquired in recognition of privilege accorded a sovereign foreign state. We perceive no relevance of the doctrine of restrictive immunity to the issue here involved.

Apart from the fact that Rule 4 of the Federal Rules of Civil Procedure makes no provision for service upon a foreign government, it is recognized that a foreign consul is not by virtue of his office an agent of the government he represents, or of its citizens whom he may serve, for the purpose of service of process. *Oster* v. *Dominion of Canada,* (N.D. N.Y. 1956), 144 F. Supp. 746, aff. 238 F. 2d 400, cert. den., 353 U.S. 936; *In Re Herman's Estate,* 159 Minn. 274, 198 N.W. 1001. In *Oster* it was held that service on a consul is not effective to obtain *in personam* jurisdiction over the sovereign state he represents. And in *Herman* it was pointed out that the functions of a consul in the protection of the interests of the citizens of the country he represents do not, in the absence of specific authorization, constitute him their agent for service of process.

The Argentine consul at Chicago was not by law or specific appointment the agent of either of the defendants for service of process. He was but the particular Argentine consul selected by the plaintiff, pursuant to the contract, to perform a normal routine duty of a consul in authenticating the documents required to be presented in connection with obtaining payment under the contract's provisions. The record does not support a conclusion that the consul became an agent of DGFM for the purpose of service of process. The service on the consul did not confer *in personam* jurisdiction over either of the defendants and the District Court did not err in quashing that service.

We turn to consideration of whether the extra-territorial service made on DGFM in Buenos Aires was effec-

tive to confer *in personam* jurisdiction over that defendant. Plaintiff contends, in substance, that by establishing the letter of credit with the Illinois bank for the purpose of paying the purchase price in performance of its part of the contract, and in requiring that the bills of lading and invoices to be presented as conditions precedent to such payments be "duly legalized" by an Argentine consul, DGFM supplied prerequisite minimal contacts in the transaction of business in Illinois which subject DGFM to the jurisdiction of the District Court. Rules 4(f) and 4(d)(7) of the Federal Rules of Civil Procedure recognize the validity of extra-territorial service made in the manner prescribed by a valid enactment of the state in which the district court is held. And plaintiff relies upon Section 17(1)(a) of the Illinois Civil Practice Act, which authorizes extra-territorial service where the cause of action arises from the person's "transaction of any business" within Illinois, as authorizing the service made on DGFM in Buenos Aires. We have had occasion to point out that although the Illinois statute has widened considerably the bases for service on non-resident defendants in *in personam* suits there still remain important limitations on a state's power to extend jurisdiction beyond its territorial limits. *Trippe Manufacturing Company* v. *Spencer Gifts, Inc.*, 7 Cir., 270 F. 2d 821, 822-823. See also: *Schmidt* v. *Esquire, Inc.*, 7 Cir., 210 F. 2d 908; *National Gas Appliance Corp.* v. *AB Electrolux*, 7 Cir., 270 F. 2d 472; *Insull* v. *New York World-Telegram Corporation*, 7 Cir., 273 F. 2d 166; and *Edwin Raphael Company, Inc.* v. *Maharam Fabrics Corporation*, 7 Cir., 283 F. 2d 310 in which the scope and application of the Illinois statute was considered and the "minimal contacts" requirement of due process recognized.

Likewise, the Illinois Supreme Court in *Grobark* v. *Addo Machine Co., Inc.*, 16 Ill. 2d 426, 158 N.E. 2d 73, in keeping with the rationale of *Hanson* v. *Denckla*, 357 U.S. 235, has in construing the "transaction of any business within this State" provision of the statute held that sales of machines over an extended period by a New

York corporation to an Illinois dealer, appointed its exclusive distributor for a designated area, did not make the corporation amenable to extra-territorial service in a suit by the dealer. It was pointed out that the New York corporation was not licensed to do business in Illinois; maintained no office in Illinois; had no officers, agents or employees within the state; and that the relationship between the plaintiff and the corporation was purely one of purchaser and seller. It was held that the corporation did not have the "minimal contacts" requisite to subject it to the jurisdiction of the Illinois courts—that it was not transacting business in Illinois.

In our opinion *Grobark* is controlling in the instant case. In so far as the record discloses DGFM maintains no contacts with Illinois and the contract involved represents but an isolated transaction in which the relation between DGFM and the plaintiff is merely that of purchaser and seller. The arrangement to make the contract payments through utilization of a letter of credit on an Illinois bank and to require plaintiff to secure consular authentication of the bills of lading and invoices to be presented as conditions precedent to payment does not in our opinion constitute the transaction of business in Illinois by DGFM within the meaning and purpose of the statute here involved or supply the "minimal contacts" essential to a valid assertion of extra-territorial jurisdiction. A non-resident purchaser from an Illinois vendor, without other contact with Illinios, is not by reason of such payment device subjected to jurisdiction of the Illinois courts and thus made amenable to extra-territorial service of process.

Nothing in the record before us discloses that DGFM has purposefully availed itself of "the privilege of conducting activities within the forum state, [Illinois] thus invoking the benefits and protection of its laws". *Hanson* v. *Denckla*, 357 U.S. 235, 253. The District Court did not err in quashing the extra-territorial service on DGFM.

Jurisdiction over the persons of the defendants was not acquired by the service of process here made and since there appears to be no chance of curing the defect by proper service of process it was not error to dismiss the action. *Oster* v. *Dominion of Canada, supra.*

The judgment orders of the District Court appealed from are affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois
Thursday, June 11, 1964
Before

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

THE PURDY COMPANY,
Plaintiff-Appellant,
vs.
ARGENTINA, a foreign state, and DIRECCION GENERAL DE FABRICACIONES MILITARES OF ARGENTINA,
Defendants-Appellees.

No. 14526

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment orders of the said District Court in this cause appealed from be, and the same are hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois
Tuesday, July 14, 1964
Before

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

THE PURDY COMPANY,
Plaintiff-Appellant,
No. 14526 vs.
ARGENTINA, a foreign state, and DIRECCION GENERAL DE FABRICACIONES MILITARES OF ARGENTINA,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for a rehearing of this cause filed by plaintiff-appellant be, and the same is hereby,

DENIED.

APPENDIX B.

TATE LETTER

20 Dept. State Bull., 984 (1952)

May 19, 1952.

My Dear Mr. Attorney General:

The Department of State has for some time had under consideration the question whether the practice of the Government in granting immunity from suit to foreign governments made parties defendant in the courts of the United States without their consent should not be changed. The Department has now reached the conclusion that such immunity should no longer be granted in certain types of cases. In view of the obvious interest of your Department in this matter I should like to point out briefly some of the facts which influenced the Department's decision.

A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*). There is agreement by proponents of both theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property excepted) or with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary.

The classical or virtually absolute theory of sovereign immunity has generally been followed by the courts of

the United States, the British Commonwealth, Czechoslovakia, Estonia, and probably Poland.

The decisions of the courts of Brazil, Chile, China, Hungary, Japan, Luxembourg, Norway, and Portugal may be deemed to support the classical theory of immunity if one or at most two old decisions anterior to the development of the restrictive theory may be considered sufficient on which to base a conclusion.

The position of the Netherlands, Sweden, and Argentina is less clear since although immunity has been granted in recent cases coming before the courts of those countries, the facts were such that immunity would have been granted under either the absolute or restrictive theory. However, constant references by the courts of these three countries to the distinction between public and private acts of the state, even though the distinction was not involved in the result of the case, may indicate an intention to leave the way open for a possible application of the restrictive theory of immunity if and when the occasion presents itself.

A trend to the restrictive theory is already evident in the Netherlands where the lower courts have started to apply that theory following a Supreme Court decision to the effect that immunity would have been applicable in the case under consideration under either theory.

The German courts, after a period of hesitation at the end of the nineteenth century have held to the classical theory, but it should be noted that the refusal of the Supreme Court in 1921 to yield to pressure by the lower courts for the newer theory was based on the view that that theory had not yet developed sufficiently to justify a change. In view of the growth of the restrictive theory since that time the German courts might take a different view today.

The newer or restrictive theory of sovereign immunity has always been supported by the courts of Belgium and Italy. It was adopted in turn by the courts of

Egypt and of Switzerland. In addition, the courts of France, Austria, and Greece, which were traditionally supporters of the classical theory, reversed their position in the 20's to embrace the restrictive theory. Rumania, Peru, and possibly Denmark also appear to follow this theory.

Furthermore, it should be observed that in most of the countries still following the classical theory there is a school of influential writers favoring the restrictive theory and the views of writers, at least in civil law countries, are a major factor in the development of the law. Moreover, the leanings of the lower courts in civil law countries are more significant in shaping the law than they are in common law countries where the rule of precedent prevails and the trend in these lower courts is to the restrictive theory.

Of related interest to this question is the fact that ten of the thirteen countries which have been classified above as supporters of the classical theory have ratified the Brussels Convention of 1926 under which immunity for government owned merchant vessels is waived. In addition the United States, which is not a party to the Convention, some years ago announced and has since followed, a policy of not claiming immunity for its public owned or operated merchant vessels. Keeping in mind the importance played by cases involving public vessels in the field of sovereign immunity, it is thus noteworthy that these ten countries (Brazil, Chile, Estonia, Germany, Hungary, Netherlands, Norway, Poland, Portugal, Sweden) and the United States have already relinquished by treaty or in practice an important part of the immunity which they claim under the classical theory.

It is thus evident that with the possible exception of the United Kingdom little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity. There are evidences that British authorities are aware of its deficiencies and ready for a

change. The reasons which obviously motivate state trading countries in adhering to the theory with perhaps increasing rigidity are most persuasive that the United States should change its policy. Furthermore, the granting of sovereign immunity to foreign governments in the courts of the United States is most inconsistent with the action of the Government of the United States in subjecting itself to suit in these same courts in both contract and tort and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant vessels. Finally, the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign relations.

In order that your Department, which is charged with representing the interests of the Government before the courts, may be adequately informed it will be the Department's practice to advise you of all requests by foreign governments for the grant of immunity from suit and of the Department's action thereon.

Sincerely yours,

For the Secretary of State:

Jack B. Tate
Acting Legal Adviser